

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14243

JAMES J. CLARK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 7 1958

Joseph D. Stewart
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No. 14243

STATEMENT OF QUESTIONS PRESENTED

In this case there were two defenses to an indictment charging first degree murder—intoxication and insanity. The latter depended almost entirely on insubstantial and incredible testimony of the appellant himself. As to the former, although the degree of drunkenness was in conflict, there was evidence of heavy drinking.

In the opinion of the appellee the following questions are presented:

1. Is the "some evidence" test, governing entitlement to an instruction on the issue of insanity, the same as that warranting direction of a judgment of acquittal on that ground?
2. Was appellant effectively represented by retained counsel, or was flagrant mismanagement indicated by highlighting the defense of intoxication in argument, by the manner in which the *voir dire* was conducted, and in other minor particulars?

(1)

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

(a) The commission of the crime

A one-count indictment was filed charging that James J. Clark, the appellant, on February 27, 1957, purposely and with deliberate and premeditated malice, murdered Jack Douglas with a shotgun (R. 272). Found guilty by the jury as indicted (R. 275), he appeals from a death judgment (R. 289).

The killing took place at a gasoline station at 940 Florida Avenue NW., a block from where appellant lived (905 V St. NW.) (R. 34, 124). The civilian witnesses called by the Government were all friends or relatives of the appellant. Mr. Sherwood Gist, who operated the station, and who left just before the shooting, had known appellant fifteen years and the decedent one (R. 35-37). Thomas Sanders, to whose home appellant went after the killing, was a cousin of appellant's wife (R. 62-63, 89). There were three present, besides appellant and the deceased, at the time of the killing: Mr. Gist's

employee at the station, a cousin of the appellant named Edward T. Wimbush (R. 37, 41, 101, 115); Henry E. Gibson, Jr. (R. 55); and John H. Clark, appellant's brother (R. 100). John H. Clark, as well as the appellant, took the stand on defense (R. 100, 116).

It was undisputed¹ that the murder weapon, a twelve gauge choke-barrelled shotgun,² belonged to appellant, was kept by him a block away from the gas station in an upstairs closet under circumstances indicating his sole opportunity, as appellant conceded, to get the gun, load it (it was kept unloaded) and use it in the manner witnessed.

Appellant arrived at the gas station (having been there earlier in the evening) after 8 p. m. on February 27, 1957, the decedent, Jack Douglas, arriving about the same time. Wimbush was in the back of the office lying down on some tires (R. 42). The office contains a television set³ which they were watching (R. 56). Some time after their arrival appellant and the deceased engaged in heated words, at about which time (between 8:30 and 9 p. m.) Mr. Gist arrived (R. 43, 37). Mr. Gist noted "they had been drinking, but I wouldn't say they were drunk"⁴ (R. 40). As Mr. Gist de-

¹ Although he claimed on the stand he did not remember what he was doing at the time of the shooting, appellant testified nobody could have got and used the shotgun but himself (R. 120). Appellant stated he had purchased it about seven months before the crime (R. 139). He kept it in a clothes closet (equipped with a door) on the second floor of 905 V Street NW. Nobody knew where it was but him. No one had access to it but him (except his small children and wife) (R. 120, 138). Appellant testified that he kept the gun unloaded, and there was but one shell, kept separately in a box (R. 133).

² R. 50; Gov. Ex. 4, R. 77.

³ R. 47-48; Gov. Ex. 3, R. 96 (photo).

⁴ A blood test, performed on the deceased, showed a concentration of .2% alcohol, described by the coroner as indicating the "early stages of intoxication" (R. 32).

As to appellant's state of insobriety, the eye witnesses of the crime testified as follows: *Wimbush*: Appellant and the deceased had been drinking wine in the station that night; he did not know whether or not appellant was "drunk"; he did not consider them drunk at the time (R. 53-54). *Gibson*: Appellant was "pretty drunk. . . . He had been drinking. I couldn't say if he was drunk" (R. 61). He replied to a defense question that appellant was not "drooling" (R. 61-62). (Appellant's brother testi-

scribed it, they were arguing about "who could whip each other" ⁵ (R. 37).

Mr. Gist told the appellant and the deceased to get out of the office; they complied but kept up the disturbance outside where Wimbush and appellant's brother parted them (R. 37, 44). They "calmed down" and appellant and the deceased returned to the office with the others (R. 37, 57). No blows had been struck nor any weapons exhibited (R. 60, 62, 111, 126). At this time Mr. Gist left (R. 37). In the office the appellant and deceased resumed the argument (R. 57). Then, Mr. Gibson testified, appellant left, saying to the deceased "Stay here until I come back or be here until I come back" (R. 58). The deceased, seated and watching television, did not reply (R. 58).

About fifteen minutes later ⁶ the murder occurred (about 9:25 p. m.) (R. 45, 83). At this time the deceased was sitting at one end of the desk with his back toward a window close behind him (R. 46-47; Gov. Ex. 3, R. 96 (photo)). He, as well as the others, were watching television (R. 45-46, 110). At the other end of the desk Wimbush was seated (R. 48). Gibson was sitting behind the deceased (R. 58). John H. Clark, appellant's brother, was standing (R. 110). Appellant's brother "hollered, 'Watch out' " " 'Here comes Jack' "

fied that he was (R. 103).) Gibson heard appellant's brother tell the deceased that appellant was in no condition to fight (R. 62).

Appellant's brother, *John H. Clark* (R. 100), stated that at about 8:50 p. m. his brother seemed "halfway drunk"; at the time of the argument appellant was "actually drunk" (R. 100, 103). Just before the shot, he claimed, appellant was staggering (R. 104).

Appellant, *James J. Clark*, testified that he had started drinking that day at about 4:30 or 5 p. m., where during the ensuing hour or two he consumed at home a half-pint of whisky and a pint of wine (R. 116, 148). At the gasoline station he had about three drinks of wine (R. 148).

⁵ Mr. Gibson's version was they "were arguing about who could beat who, who was the strongest" (R. 56-57).

⁶ The witnesses gave the time of appellant's return with the shotgun as follows: *Wimbush*: "about 15 minutes" (R. 45); *Gibson*: "approximately 10 or 15 minutes" (R. 58-59); *John H. Clark*, appellant's brother (R. 100): "two or three minutes" (R. 111).

Appellant claimed a loss of memory at the point where he left the gas station (E. g., R. 119, 127).

⁷ Appellant was known as "Jack" (R. 45).

with the shotgun' " (R. 45, 59). The brother slammed the door, causing it to lock (R. 45-46).

Appellant, without saying anything, fired through the window behind the deceased, the glass hitting Wimbush (R. 47-48, 60). The deceased received the full discharge, which blew a hole in his back about two and a half inches wide, the shot macerating his vital organs (R. 31-32). The coroner estimated the weapon was held about three feet from the body (R. 32).

Wimbush ran outside, followed by Gibson (R. 48, 59). Wimbush disarmed the appellant and smashed the shotgun against a wall (R. 48). When Wimbush went to call police appellant left the scene (R. 49). (He was not arrested until 6:30 p. m. the next day, February 27, 1957, twenty-one hours after the crime (R. 94).)

About an hour after the crime, at 10:30 p. m., appellant arrived at the rooms of a relative of his wife, named Thomas Saunders, who lived at 1213 Girard Street N. W. (R. 63, 89). Among other things, Mr. Saunders testified that appellant asked him if he could spend the night and was refused (R. 65). The witness did lend appellant an overcoat at appellant's request (R. 67-68). Appellant told Saunders he and a "fellow had been in a fight" (R. 66). At the door, leaving Saunders, appellant shook hands with him, asking Saunders to give appellant's wife and children his love. According to Saunders appellant said "I wouldn't do this borrowing if him and I hadn't had a fight . . . I don't know what made me do that" (R. 68).

(b) Appellant's testimony and confession

Among other things, appellant testified that he had been "drinking pretty heavy during the day" (R. 116). Appellant testified that he remembered everything up until he left the station, presumably to get the shotgun, except his final threat to the deceased (R. 127-128). He professed no memory of events thereafter, at least as of the night of the crime (R. 154). When he sobered up the next "morning" at 435 N

Street NW., he knew he was there only because he awoke there (R. 159-160, 177). However, a partial recollection of faces returned the next day, including such items as Wimbush's grabbing and destroying the shotgun and the fact that he had been at Saunders' home on Girard Street after the crime (R. 154-55).

In addition to his claim of the return of partial memory, appellant testified that he read about the crime in the newspapers about 4 p. m. the day after the crime. He telephoned his wife and she also provided him with details (R. 173). From what he had read and was told he deduced he must have committed the crime as he alone could have gone to his home, retrieved the shotgun, and loaded and used it. See note 1. Therefore he told his wife to bring the police⁸ (R. 121).

Appellant testified that he killed appellant under the influence of alcohol and "unknowing of what I was doing" (R. 118, 120). Nowhere in his case in chief was the defense of insanity directly raised. At the close of the direct examination, however, there was the indirect remark by appellant that he had told his wife "I did this crime unbeknowing to what I was doing in a crazy and insanity manner" (R. 120, 121).

The term "crazy and insanity manner" having been used indirectly in a report of a conversation, the words might have been taken to denote a mere claim of extreme drunkenness, especially in view of main reliance on the latter defense. In the course of cross-examination it was not always clear when appellant was using such terms as "out of my head" to mean mere lapse of memory due to drunkenness (E. g., R. 156). In answer to a direct question of the prosecutor, however, ap-

⁸ On direct examination appellant advanced this ability to reconstruct the events of the night before in explanation of the fact that, despite his claimed loss of memory, the day after the crime he was able to give the police a complete narrative of the events (R. 120; Gov. Ex. 5, R. 82-90 (written confession)). The details given on cross-examination were not consistent. Appellant testified that the following "morning", when he awoke, he decided to give himself up (R. 177-178). He had previously testified that he only realized he had killed the deceased at about 4 p. m. when he had read the newspapers (R. 173-174). Confronted with the discrepancy he withdrew the former statement (R. 178).

pellant unequivocally stated that his defense was "both" intoxication and insanity" (R. 122).

Appellant stated that he had, the evening of his arrest, talked to a police lieutenant before Sergeant Crooke arrived, and that notes had been taken by a police officer, describing Private Simms of the Homicide Squad (R. 140-143). He claimed to have told the lieutenant he "should be examined by a psychiatrist" (R. 140). He had not asked for a mental examination since (R. 141).

In rebuttal Officer Simms testified that Captain Hartnett had asked appellant questions eliciting a case history (R. 196). The officer took notes which he produced (R. 196-197). The notes related to previous medical history and army service. The following is an excerpt:

"Talked by Lieutenant Hartnett to Clark . . . Has an aunt that is insane. I am not crazy, but I would like to be. I think I would rather be in St. Elizabeth's than in jail. I know the difference between right and wrong. I don't think what I did was right, but he kept picking on me and threatening me" (R. 197).

Appellant testified that he had not only surrendered voluntarily but freely gave a written statement (R. 121, 175). He constantly reiterated that the statement was objectively true, and he did not wish to "dispute" it (E. g., R. 130, 133). When asked if he had told the police he was merely reconstructing the facts, appellant was evasive (R. 133). When pinned down, he stated he could have given Sergeant Crooke, who took the written statement, the wrong impression that he had been conscious of his actions the night before (R. 128). Sergeant Crooke, in rebuttal, testified that at the time of giving the statement appellant did not say that he was merely reconstructing his actions (R. 190).

Appellant's confession was not objected to by counsel in view of appellant's reliance upon it (R. 81). Appellant emphasized exculpatory statements contained therein, notably the following: he "went home, under influence of alcohol and scared of him"; appellant shot "under the influence of alcohol and being a scared of what he would do to me later"; he shot "In a crazy stage of being a scared of him and being half out of my mind". Compare R. 84, 88 with R. 135, 137.

* It is undisputed by appellant that the trial court completely and accurately charged on the issues of insanity (R. 233-237) and drunkenness (R. 242-244). The sole error assigned to the trial judge is his failure to order a new trial or direct judgment of acquittal on the ground of insufficient evidence of sanity (Argument 1, Br. 9). (The only other error claimed (Br. 11) is ineffective assistance of counsel in particulars discussed in argument, *infra*.)

STATUTE INVOLVED

31 STAT. 1321 (1909), as amended, 22 D. C. CODE § 2401 (1951):

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402 of this Code, rape, mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

SUMMARY OF ARGUMENT

I

Appellant concludes entry of a judgment of acquittal by reason of insanity should have been directed below. The conclusion is not derived from any claim that the evidence of insanity was strong but rests purely on the incorrect technical premise that the "some evidence" test, governing entitlement to an instruction on the issue of insanity, is the same as that warranting direction of entry of judgment of acquittal on that ground.

II

Flagrant mismanagement of the case by retained counsel is not made out on the record which indicates careful preparation and conduct of the defense.

ARGUMENT

I. Direction of entry of judgment of acquittal (insanity) would have been unwarranted

Appellant's first argument (Br. 8-10) concludes that the "government did not meet its burden in proving the sanity of the defendant beyond a reasonable doubt, and that as a consequence of this failure of proof the Court should have granted

a motion for judgment of acquittal non obstante veredicto" (Br. 10). The conclusion is not derived from any claim that the evidence of insanity was strong but is permitted purely by a confusion and misapplication of recognized tests. In brief, the argument is that the test of entitlement to an instruction on the issue of insanity is the same that governs the power to take a case from a jury by directing entry of judgment of acquittal by reason of insanity.

In detail, appellant's argument is that he "raised the issue of his sanity by 'some evidence'" (Br. 8). Appellant then reads the *Tatum* case¹⁰ as requiring, whether the defense of insanity be "'strong or weak . . . insufficient, inconsistent or of doubtful credibility . . .'" or "'whether the sole testimony in support of the defense is his own'", that there must be acquittal in the absence of "positive testimony . . . by the government to prove the sanity of the defendant" (Br. 9). By "positive testimony", appellant explains, he means "psychiatric testimony" (Br. 9). Lay witnesses are insufficient (Br. 9-10).

In the *Tatum* case the Court was careful to warn against confusing the "some evidence" test with those governing the exercise of other duties of the court or jury. *Id.* at 390. In the particular part of the *Tatum* precedent claimed to be applicable to appellant's first argument, the Court held that insanity was not an affirmative defense and that perceptible evidence of insanity required instruction of the jury. This explains the Court's stated unconcern with the relative strength of that evidence, a factor ordinarily irrelevant to the duty to instruct, the subject to which the opinion was addressed.¹¹

Appellant's present contention was early made and rejected by the Court in a case affirming a judgment of conviction of second degree murder and bearing strong resemblance to the instant one. *Bell v. United States*, 93 U. S. App. D. C. 173, 174, 210 F. 2d 711 (D. C. Cir. 1953), *cert. denied*, 347 U. S. 956 (1954). As in the *Bell* case, in the instant case the "defense of unsound mind was sought to be supported by appellant's testi-

¹⁰ *Tatum v. United States*, 88 U. S. App. D. C. 386, 190 F. 2d 612 (D. C. Cir. 1951).

¹¹ See *Obery v. United States*, 95 U. S. App. D. C. 28, 29, 217, F. 2d 860 (D. C. Cir. 1954).

mony he 'blacked out' at the time of the shooting . . ." *Id.* at 174. Also, as in *Bell*, there were no Government opinion witnesses, expert or lay, but only testimony as to the conduct of the deceased. Further, the evidence of claimed temporary insanity was stronger in *Bell* in that there were two defense psychiatrists "who gave support to this defense". *Ibid.* The Court held that the lay testimony was "ample to indicate soundness of mind" and that the conflict having been submitted to the jury under appropriate instructions the *Tatum* requirements were satisfied.

The only other case relied on by appellant (Br. 9) is *Fielding v. United States*, D. C. Cir. No. 13723, Dec. 23, 1957. But this case only more strongly reveals the fallacy of ignoring the weakness of evidence of insanity. This case turned not on the "some evidence" rule but on "the strong showing of insanity made by the defense" which, in the presence of additional circumstances, it was held, should have invoked exercise of the power of the court below to direct entry of a judgment of acquittal. In this connection the Court referred to the test applicable to the exercise of the latter power as follows:

"All of the lay testimony by the Government taken together was not sufficiently probative, in the face of the *strong showing of insanity* made by the defense, to permit reasonable jurymen to conclude beyond a reasonable doubt that appellant was sane at the time of the shooting."¹²

(Slip Opinion, Majority, pp. 4, 5; emphasis supplied).

Again the Court recently distinguished between the "some evidence" test and that applicable to direction of entry of judgments of acquittal, referring to strength of the evidence

¹² See also *Bradley v. United States*, D. C. Cir. No. 13431, Sept. 20, 1957: "To remove a case from the jury's consideration, the judge must be able to say that reasonable men must necessarily possess a reasonable doubt as to the defendant's sanity, i. e., that they could not reach any conclusion except that the prosecution has failed to sustain its burden of proving beyond reasonable doubt that the accused 'was capable in law of committing crime.'" (Slip opinion, Majority, pp. 4, 5). Accord, *Douglas v. United States*, 99 U. S. App. D. C. 232, 239, 239 F. 2d 52 (D. C. Cir. 1956), citing *Curley v. United States*, 81 U. S. App. D. C. 389, 160 F. 2d 229 (D. C. Cir.), cert. denied, 331 U. S. 837 (1947).

of insanity as one of the factors indispensable to the exercise of the latter power. Determinative of the issue here would seem to be the following statement:

"The nature and quantum of evidence of sanity which the Government must produce to sustain its burden and take the issue to the jury will vary in different cases. Evidence of sanity which may suffice in a case where defendant has introduced merely 'some evidence' of insanity may be altogether inadequate in a case where the evidence of insanity is substantial."

Wright v. United States, D. C. Cir. No. 13148, Oct. 30, 1957 (Slip Opinion, Majority, pp. 3, 4).

It will be recalled that when appellant shot the deceased in the back it was witnessed by appellant's relatives and friends who had heard him warn the deceased not to be there when he returned. It will be remembered appellant conceded the fact (but not the complete memory) of his having walked a block, gone upstairs, loaded a gun, returned and fired it. Further, an hour after the crime he was at the house of his wife's relative where, after borrowing an overcoat to withstand the February chill, he formally bid his friend goodbye, requesting him to convey his farewell to appellant's wife and family in obvious anticipation of impending flight or incarceration.

Appellant's reliance was, in the main, on his own interested testimony. As to drunkenness, this had weaker relation to the defense of insanity than it did to the question, resolved by the jury, of the degree of murder of which he was guilty. In a case where not only was there drunkenness and a claimed blackout, as here, but also, in contrast to the instant case, evidence of a blow on the head in the brawl followed by hospitalization, the Court said "The issue of insanity is not raised by the mere statement of a defendant that he does not remember what he did when he was drunk." Conviction was affirmed under *Tatum* even though the issue of sanity was not submitted at all. *Wright v. United States*, 94 U. S. App. D. C. 307, 309, 215 F. 2d 498 (D. C. Cir. 1954). There was in the instant case flat contradiction between appellant's claim that he had told the police the following evening of his blackout

and that he was merely reconstructing the facts and the testimony of police officers. His version also involved him in inconsistencies noted in the counterstatement. Note 8 and text *supra*.

It is also to be observed that appellant constantly reiterated that he must have been temporarily insane because of the very fact he shot his victim in the back. In the *Lebron* case the Court held that the mere fact of shooting at congressmen did not even require, under the *Tatum* case, an instruction on the subject of insanity. *Lebron v. United States*, 97 U. S. App. D. C. 133, 136, 229 F. 2d 16 (D. C. Cir. 1955), *cert. denied*, 351 U. S. 974 (1956). In *United States v. Lee*, 4 Mackey 489, 496, 15 D. C. 459 (Sup. Ct. D. C. 1886) it was stated "The authorities are explicit that the barbarous manner in which a homicide is committed does not in itself furnish any basis for the defence of insanity."

Thus the defense rested almost entirely on appellant's own interested testimony which, as the counterstatement indicates, was in major particulars of little substance or in conflict with testimony of other witnesses. It might fairly be said that:

"The fact is that, while the court properly submitted the issue to the jury, it was upon a bare minimum of evidence of insanity; indeed it appears that it was submitted chiefly because it was pleaded. There was little, if any, evidence of insanity."

Bailey v. United States, 248 F. 2d 558 (D. C. Cir. 1957).

To justify the taking of a case from a jury there must be more than the presence even of "strong" evidence of insanity. This is for the reason that in this area the separate provinces of judge and jury must particularly be respected. Therefore to argue *a priori* even from an inapplicable test, as appellant does, is contrary to the spirit of the decisions. The key is credibility which, in cases appropriate for submission to the jury, keeps alive the presumption of sanity. The Court has decided that judgments of acquittal in this field must be directed with caution and on a case-to-case basis. Credibility, in the dual aspect of determining whether testimony is intentionally or unintentionally misleading, is for the jury alone.

The testimony even of experts may be disregarded where such action is not arbitrary. *Holloway v. United States*, 80 U. S. App. D. C. 3, 145 F. 2d 665 (D. C. Cir. 1945); *Douglas v. United States*, *supra*.

As the *Tatum* case was concerned with entitlement to instructions on insanity, *Durham* was primarily concerned with what were proper guides once "some evidence" appeared. *Durham v. United States*, 94 U. S. App. D. C. 228, 214 F. 2d 652 (D. C. Cir. 1954). Incident to this the Court in *Durham* inquired into whether in that particular case the trial court, as trier of the fact, the jury being waived, had utilized correct standards in making its findings of fact. Relying on *Davis v. United States*, 160 U. S. 469, 487-488 (1895), as well as the *Tatum* case, the Court clarified the procedural situation apposite here. When "some evidence" of insanity is raised the presumption of sanity is "no longer absolute". The duty then devolves on the jury to weigh the "'whole evidence' ". *Id.* at 235. As in the *Davis* case, which describes presumptions as "instruments of proof", the presumption of sanity, in cases appropriate for submission to the jury, departs from the case only when the jury, having weighed the *whole* evidence, decides the issues of credibility or conflict in favor of a defendant. It is credibility, the determination of which is peculiarly within the jury's province, which gives the presumption vitality until this stage is reached.

It is therefore concluded that appellant is factually correct when he claims he presented no more than minimal evidence of insanity. Legally this entitled him to no more than he was accorded, instructions on the issue, whose adequacy he does not challenge.

II. Appellant's counsel gave effective assistance

Appellant's second argument (Br. 11-12) is that he was denied the effective assistance of counsel. He enumerates several alleged shortcomings of counsel in support of this conclusion.

Before reaching these, it is significant that appellant does not urge here that defense counsel did not vigorously and effectively pursue the strong point on defense, evidence of heavy

drinking. The owner of the gas station where the murder occurred, the eye witnesses, and a person who observed appellant's condition an hour after the crime, were all relatives or friends of appellant, as has been seen in the counterstatement. A study of the record reveals that in each instance the fact of drinking and the degree of drunkenness were brought out on cross-examination by experienced retained counsel who, in effect, made these witnesses his for that purpose.

In his opening statement defense counsel immediately reminded the jury of the fact that they were to decide the degree of drunkenness on what had been already elicited in the course of the Government's case as well as on what would be further brought out (R. 96). Defense counsel's examination revealed preparation. For example he had familiarized himself with the transcript of the preliminary hearing before the coroner, which he used with effect (R. 53).

In addition, appellant placed on the stand not only the appellant but his brother, an eye witness whose opinion of the degree of drunkenness was as great as his estimate of the time interval elapsing in search of the gun was short. Thus defense counsel put before the jury, with effect, evidence as to the degree of appellant's insobriety before, during and for a reasonable time after the commission of the crime.¹³

Practically all of the specific instances relied on to indicate ineffective representation are negative and worthy of little consideration. Complaint is made that "not one question was proposed by counsel for the defense on voir dire" (Br. 11). There was no reason to propose questions. The case was fairly identified by the prosecutor who posed relevant questions calculated to reveal direct knowledge of the crime or acquaintance with witnesses, parties, or attorneys (R. 6 *et seq.*). Prospective jurors were then asked if they had read about the case or heard anything over the air concerning it

¹³ In support of a motion for new trial appellant claimed in two affidavits that material witnesses on this issue had not been utilized (R. 278-281; 283-284) and a hearing was held (R. 252) on this and other contentions equally disposed of on the record made before. They are not urged by appellant here.

and if any unassigned reason affected at all their ability to be impartial (R. 12).

Not only was there no reason to ask questions, but conduct of the *voir dire* was splendid, the panel being chosen with a care obvious even on a cold record. Defense counsel exercised fifteen peremptory challenges (R. 15-20, 25), exhausting, with Government challenges, one whole panel and requiring the calling of another (R. 20). Among those eliminated by defense counsel were a retired detective sergeant who had read about the case (R. 9, 11, 17), an acquaintance of the arresting officer (R. 10, 18) and two acquaintances of the prosecutor (R. 10, 19; 23, 25).

Complaint is made (Br. 11) that no objection was made to the confession. The counterstatement indicates that this was in accordance with appellant's desire to rely upon its exculpatory aspects. Note 8 and text, *supra*. See *Lawson v. United States*, D. C. Cir. No. 13697, Oct. 3, 1957.

Complaint is further made that the "defense made no motion for judgment of acquittal" (Br. 11). As the degree of insobriety was in conflict, and therefore for resolution by the jury, this refers to appellant's first argument which, as has been seen, is one bottomed on the baseless assumption that minimal evidence of insanity requires direction of the entry of judgment of acquittal where not rebutted by psychiatric testimony. Failure to urge a point below which is not only technical, but technically inaccurate, has no remote connection with effectiveness of counsel.

It is also urged (Br. 11) that the *Tatum* case requires reversal in that defense counsel, in closing argument, stated:

"I say to you in conclusion, ladies and gentlemen, I am certain from the testimony you have heard here yesterday and today that you will not possibly conclude that this is a cold, premeditated crime. I feel certain that after His Honor explains the definition of manslaughter, that you will come in with a verdict of manslaughter. Of course, you may elect to come in with a verdict of second degree. But certainly, I sincerely trust that you will not reach the verdict as requested

by the Government, that this was a cold, premeditated crime" (R. 219).

As in *Tatum* this raises the question whether substantial rights were involved. Fed. R. Crim. P. 52 (b). Germane to this issue is the quantum of evidence of insanity. The Court has recognized that the evidence of insanity in *Tatum*, if less than in *Durham*,¹⁴ was yet more than in *Wright*,¹⁵ discussed above, in which there was no entitlement to an instruction on this issue at all. As indicated in the first argument, the quantum here, in contrast to *Tatum*, as a bare minimum as in the *Bailey* case, *supra*.

The *Bailey* case, affirming a conviction of first degree murder, stands for the proposition that a defendant's substantial rights are not involved where claimed defects in instructions on insanity are raised in a case involving but minimal evidence of insanity. This principle should apply for a stronger reason to mere argument based on the sound strategy of asserting and emphasizing the strongest point in a case.

Guilt in *Tatum* was not only conceded but the argument embodying the concession was commended and adopted by the trial court in instructions. Here the court's instructions, under the circumstances recounted above, cured any defect. With mere trial strategy the Court is not concerned. *Burton v. United States*, 80 U. S. App. D. C. 208, 209, 210, 151 F. 2d 17 (D. C. Cir. 1945) *cert. denied*, 326 U. S. 789 (1946).

"After judgment and on appeal, errors in judgment as to the conduct of the defense are easy to point out. Here the appellant selected his counsel and made no objection to his conduct during the trial. Under such circumstances it is well settled that error in judgment, incompetency or mismanagement of the defense by counsel is generally not ground for a new trial. This is not to deny that a defendant's rights may be so 'flagrantly disregarded by counsel of his own choosing, and,

¹⁴ *Durham v. United States*, *supra* at 232.

¹⁵ *Wright v. United States*, 94 U. S. App. D. C. 307, 309, 215 F. 2d 498 (D. C. Cir. 1954).

as a consequence, justice so manifestly miscarry' that a new trial should be ordered."

Ibid.

On the record no flagrant mismanagement was made out. Instead this is a case where such a standard cannot appropriately be applied to vigorous retained counsel who did his level best to drive home the strongest point in a desperate case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
JOEL D. BLACKWELL,
JOHN D. LANE,
Assistant United States Attorneys.

Joseph W. Stewart
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,243

JAMES J. CLARK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR REHEARING EN BANC

Comes now appellee, by its attorney, the United States Attorney, and moves the Court to permit rehearing before the Court, *en banc*. It is respectfully submitted that the issues summarized below are appropriate for consideration by the full Court.¹

The main defense to this homicide charge was that of intoxication sufficient to affect intent. As a witness in his own behalf, appellant testified, *inter alia*, his acts occurred "in a crazy and insanity manner" (R. 120, 121). There was rebuttal evidence tending to show appellant was not in a blackout at the time of the crime. In summation, defense counsel limited his efforts to the practical and legal effects of intoxication; without any complaint ever by appellant regarding his chosen and retained counsel. The judge presiding over the trial instructed sanity was at issue, that the jury was bound to resolve the issue, and gave full and complete instructions applicable to the issue.

A majority of a panel of the Court reversed: ²

"Defense counsel's attempt to take the defense of insanity out of the case was error. We cannot say it was not prejudicial. It must have tended, and may have

¹ The Court has been granted power to order rehearing *en banc* "and the discretion for its exercise." 28 U. S. C. § 46 (c) (1952); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 237, 259 (1953).

² The opinions in this case were issued August 7, 1958.

tended effectively, to persuade the jury to disregard the court's subsequent instruction that they should find the defendant not guilty by reason of insanity unless they found, beyond a reasonable doubt, that he was sane." (Slip opinion, p. 2.)³

The dissent noted "there was in reality no *evidence* of insanity, but only appellant's naked, self-serving speculations that he must have been crazy; and indeed, he had himself contradicted even these statements." (Emphasis from text, slip opinion, pp. 3-4.) His analysis of the views of the majority of the panel revealed to the dissenting member that their holding of "the 'ineffectiveness' of counsel rests entirely on [defense counsel's] failure to argue insanity and on the calculated decision to concede guilt of a lesser degree." As the dissent viewed the issue, "a defense lawyer who would try to make out an insanity defense on the 'evidence' of insanity in this record might well be charged with incompetence for taking the risk of alienating the jury's sympathies." (Slip opinion, p. 5.)

It is the view of the present petitioner that the issue which is basic to a proper disposition of this case is whether self-serving declarations, non-factual in content, by a defendant as a witness in his own behalf, may ever be "evidence" of insanity, in the sense that such non-factual statements, alone, uncorroborated and unsupported, and substantially self-contradicted, and otherwise rebutted, are sufficient to precipitately shift the burden to the prosecution of proving sanity beyond a reasonable doubt. Cf. *Douglas v. United States*, 99 U. S. App. D. C. 232, 239 F. 2d 52 (1956). If negatively answered, then in the instant case, the insanity instructions given by the trial judge were not required; and, by getting the instructions, appellant received a benefit to which he was not entitled. So, also, defense counsel could not be expected to argue the sanity issue to the jury. We believe this issue to be not dependent upon the record in the instant case, and, that its ramifications

³ The dissent notes (Slip opinion, p. 5, fn. 3) :

"The majority seemingly wishes to avoid calling counsel's 'error' ineffective assistance, but error of counsel is not grounds for reversal unless it defeats a fair trial."

have wide impact in the general administration of criminal law.

The holding of the majority of the division in the instant case permits silence at the opening of the trial; the defendant's case; yet, permits the defense of insanity first to be raised by the defendant on the witness stand. Such precipitate shifting of the burden of proof of sanity impels miscarriages of justice. Judicially—made law is strict in the need for expert testimony to satisfy the prosecution's burden.⁴ Preparations leading to the availability of such expert testimony, are not possible during the time remaining near the end of a trial. Any type of rebuttal evidence on the issue of sanity requires some preparation; and, hasty preparation results in struggles by juries on the "beyond" of the reasonable doubt burden. Avenues are opened for an overreaching type of defense strategy. Counsel, desperate because of the nature of the case or otherwise, may informally mislead the prosecution and then surprise it by calculated springing of the defense. Justice in such instances is controlled by unpreparedness and surprise contrary to the trend of modern law.⁵ Rules 16, 17, Federal Rules of Criminal Procedure.

Different defenses in different forums accrue. The instant case demonstrates that a defendant may consciously avail himself of his counsel's strategy in the trial, and then on appeal avail himself of his counsel's good reputation—under the guise of ineffectiveness. If successful on appeal—as in this case—nothing prevents renewal of the same strategy all over again in the second trial. No one can force upon a defense counsel the argument to be made by counsel to the jury. Delay or injustice is caused by any of the possible results. Delay itself is detrimental to the administration of justice.

The holding of the panel that sanity was properly in issue is in conflict with this Court's ruling in *Wright v. United*

⁴ *Wright v. United States*, — U. S. App. D. C. —, 250 F. 2d 4, 9-10 (1957).

⁵ Remedial legislation is pending. H. R. 13492, 85th Cong., 2d Sess. See also, American Law Institute, Model Penal Code, Tentative Draft number 4, Section 4.03 (2), pp. 28-29, published April 25, 1955.

States, 94 U. S. App. D. C. 307, 215 F. 2d 498 (1954), rehearing denied September 30, 1954. There also the defendant alone testified in support of an intoxication defense and claimed-blackout. Defense counsel agreed with the court that "he didn't put in any evidence" to warrant an instruction on the issue of insanity, 215 F. 2d, p. 500. No instruction on the issue of sanity was given. This Court held "The issue of insanity is not raised by the mere statement of a defendant that he does not remember what he did when he was drunk." *Ibid*. Even the actions of defense counsel in this case and in the *Wright* case are similar. These two decisions by the Court are not, properly, to be reconciled.

In the instant case there was a fair trial. The evidence showed a clear prima facie case of first degree murder. The defense based upon intoxication was amply illuminated for the jury. The asserted conclusions of insanity were stated to be dependent upon hindsight and reconstruction of defendant of prior events, which events occurred while defendant's mind was claimed to be in a black-out. The jury had ample testimony on all pertinent matters to justify crediting and rejecting the evidence so as to validly reach the verdict rendered. It must be presumed the jury properly followed the court's instructions to weigh the sanity issue, and did resolve that issue by applying those instructions. *Pennsylvania Co. v. Roy*, 102 U. S. (12 Otto) 451, 459, 26 L. Ed. 141 (1880).

CONCLUSION

Wherefore, it is respectfully suggested that the Court's discretion would appropriately be exercised by an order of a rehearing en banc.

(s) Oliver Gasch,
OLIVER GASCH,
United States Attorney.

(s) Carl W. Belcher
CARL W. BELCHER,
Assistant United States Attorney.

CERTIFICATE OF GOOD FAITH

It is hereby certified that the petition is presented in good faith and not for delay.

(s) Carl W. Belcher,
CARL W. BELCHER,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been mailed to attorney for appellant, Wesley S. Williams, Esq., 620 5th Street, NW., Washington, D. C., this ~~22~~²³ day of August, 1958.

(s) Carl W. Belcher,
CARL W. BELCHER,
Assistant United States Attorney.